NO. 22733

IN THE

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

SYDNEY N. FLOERSHEIM, an individual trading and doing business as FLOERSHEIM SALES COMPANY and NATIONAL RESEARCH COMPANY,

Petitioner,

vs.

FEDERAL TRADE COMMISSION,

Respondent.

PETITION TO REVIEW ORDER OF THE FEDERAL TRADE COMMISSION

PETITIONER'S REPLY BRIEF

MURRAY CHOTINER
Suite 6, Dover Building
833 Dover Drive
Newport Beach, California
92660

Attorney for Petitioner

TOPICAL INDEX

TABLE OF AUTHORITIES CITED

Cases

Texts

Miscellaneous

NO. 22733

IN THE

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

SYDNEY N. FLOERSHEIM, an individual trading and doing business as FLOERSHEIM SALES COMPANY and NATIONAL RESEARCH COMPANY,

Petitioner,

vs.

FEDERAL TRADE COMMISSION,

Respondent.

PETITION TO REVIEW ORDER OF THE FEDERAL TRADE COMMISSION

PETITIONER'S REPLY BRIEF

ARGUMENT

I

IT IS THE DUTY OF THIS APPELLATE COURT TO REVIEW THE DECISION AND ORDER OF THE FEDERAL TRADE COMMISSION IN LIGHT OF THE ENTIRE RECORD FROM BELOW, INCLUDING THE HEARING EXAMINER'S RECORD, TO DETERMINE IF THERE IS "SUBSTANTIAL

EVIDENCE" TO SUPPORT THAT DECISION AND ORDER.

The Commission, in its brief, would have this court abdicate its judicial function to the "sound discretion" of the Commission. (See Commission's brief, pages 18, 20, 35, 43, and 45.) Throughout its brief, the Commission continuously urges that its findings are conclusive. However, the "conclusiveness" of the Commission's findings only comes into play if there is "substantial evidence" to back up the Commission's findings. This is made clear by the court in the case of Gelb vs. Federal Trade Commission, 144 F.2d 580 (2nd Cir. 1944), where it was stated:

> "We are not unmindful of the statutory admonition that the Commission's findings as to the facts, 'if supported by evidence, shall be conclusive' 15 U.S. C.A. Sec. 45(c); Federal Trade Commission vs. Standard Education Society, 302 U.S. 112, 58 S.Ct. 113, 82 L.Ed. 141. But this provision must be interpreted as requiring substantial evidence as the basis of findings in order to render them conclusive. J.B. Lipencott Company vs. Federal Trade Commission, 3 Cir. 137 F.2d 490, 491 and authori-

ties there cited."

Thus, it should be clearly understood that the purpose of the appeal to this court is to determine whether there is "substantial evidence" to support the Commission's Decision and Order and whether or not the Commission acted unreasonably, arbitrarily and capriciously in its order. We would not impose upon this honorable court's time and wisdom merely to have the Commission inform the court that it is the "expert in the field" and that therefore its Decision and Order must, of necessity, be correct. The duty of the Courts of Appeals in the review of administrative agency decisions was clearly set forth by the Supreme Court in the case of Universal Camera Corporation vs. National Labor Relations Board, 340 U.S. 474, 489-490 (1951):

> "We conclude, therefore, that the Administrative Procedure Act and the Taft-Hartley Act direct that courts must now assume more responsibility for the reasonableness and fairness of Labor Board decision than some courts have shown in the past. Reviewing courts must be influenced by a feeling that they are not to abdicate the conventional judicial function. Congress has imposed on them the responsibility for assuring that the

board keeps within reasonable grounds. That responsibility is not less real because it is limited to enforcing the requirement that evidence appear substantial when viewed, on the record as a whole, by courts invested with the authority and enjoying the prestige of the courts of appeals. The board's findings are entitled to respect; but they must nevertheless be set aside when the record before a Court of Appeals clearly precludes the board's decision from being justified by a fair estimate of the worth of the testimony of witnesses or its informed judgment on matters within its special competence or both."

The Commission, throughout its brief, insists that Petitioner's reliance upon the hearing examiner's findings and analysis and the examiner's findings themselves are irrelevant and "of no particular significance" and that it is the Commission's findings that are under review and not those of the hearing examiner. (See Commission's brief, pages 20 and 45.) However, the cases are clear that in a review of the Federal Trade Commission's rulings the "entire record" of the proceedings below must be considered by the reviewing court. In

fact, the very case cited by the Commission as authority for the fact that it is the Commission's findings that are under review and not those of the examiner makes clear the error of the Commission's argument that the hearing examiner's findings and analysis are irrelevant:

> "In their brief counsel for the Commission state the findings of the trial examiner are of no interest to this court, implying, we assume, that we are not to give them any consideration. We do not agree with that statement, although we recognize that it is the Commission which has the ultimate responsibility of finding the facts and that it is the findings of the Commission that we are authorized to review.
>
> "Our duty is to ascertain whether on the record as a whole there is substantial evidence to support the findings of the Commission. (Footnote 1: Administrative Procedure Act, 60 Stat. 237, 5 U.S.C.A. Sec. 1001 et seq.) In a very recent case involving the findings of the Labor Board, Universal Camera Corp. vs. N.L. R.B., 151, 71 S.Ct. 456, 457, the Supreme Court said: '*** Surely an examiner's

report is as much a part of the record as the complaint or the testimony. ***'

"Also: 'It is therefore difficult to escape the conclusion that the plain language of the statutes directs a reviewing court to determine the substantiality of evidence on the record including the examiner's report. The conclusion is confirmed by the indications in the legislative history that enhancement of the status and function of the trial examiner was one of the important purposes of the movement for administrative reform.' And further: '***Nothing suggests that reviewing courts should not give the examiner's report such probative force as it intrinsically commands.***'

"The court also said: 'We do not require that the examiner's findings be given more weight than in reason and in the light of judicial experience they deserve. The 'substantial evidence' standard is not modified in any way when the board and its examiner disagree. We intend only to recognize that evidence support-

ing a conclusion may be less substantial when an impartial, experienced examiner who has observed the witnesses and lived with the case has drawn conclusions different from the board's than when he has reached the same conclusion. The findings of the examiner are to be considered along with the consistency and inherent probability of testimony. *** (Footnote 2: Although in the Universal Camera case, supra, the court was considering Labor Board findings and order, the same rule is applicable to findings of the F.T.C. The court there said: 'It would be mischievious word-laying to find that the scope of review under the Taft-Hartley Act (29 U.S.C.A. Sec. 141 et seq.) is any different from that under the Administrative Procedure Act. *** And so we hold that the standard of proof specifically required of the Labor Board by the Taft-Hartley Act is the same as that to be exacted by courts reviewing administrative action subject to the Administrative Procedure Act.')" Folds vs. Federal Trade Commission,

187 F.2d 658, 660-661 (7 Cir. 1951).

Petitioner took much care in his opening brief to point out to the court the hearing examiner's findings and analyses (much to the dislike of the Commission, as pointed out in its Reply Brief) and the manner in which these findings and analyses were diverse and adverse from those of the Commission itself. Petitioner's purposes for pointing out these differences are obvious and they are two-fold: (1) To help point out to the court the evidence in the record which is contradictory to the findings and rulings of the Commission, and (2) to point out to the court the unreasonableness, arbitrariness, and prejudice of the Commission which must have existed on its part to have reached such an adverse ruling to its own hearing examiner's findings and ruling. In the determination of whether or not there is substantial evidence to support the Commission's decision, the reviewing court must look to "all" of the evidence -- both supporting and contradictory -- which was presented to the hearing examiner:

> "In reviewing the findings of the Commission we must consider the record as a whole. While the findings of the Examiner were certainly not binding upon the Commission, they are part of the record, and are entitled to considera-

tion in appraising the correctness of the ultimate findings of the Commission." Benrus Watch Company vs. Federal Trade Commission, 352 F.2d 313, 321 (8 Cir. 1965); Evis Manufacturing Company vs. Federal Trade Commission, 287 F.2d 831 (9th Cir. 1961); Minneapolis-Honeywell Regulator Company vs. Federal Trade Commission, 191 F.2d 786 (7th Cir. 1951).

"Whether or not it was ever permissible for courts to determine the substantiality of evidence supporting a Labor Board decision merely on the basis of evidence which in and of itself justified it, without taking into account contradictory evidence or evidence from which conflicting inferences could be drawn, the new legislation definitely precludes such a theory of review and bars its practice. The substantiality of evidence must take into account whatever in the record fairly detracts from its weight." Universal Camera Corporation vs. National Labor Relations Board, 340 U.S. 474, 488 (1951).

It is Petitioner's contention that there is no

deception in his practices in the operation of his legitimate business. (See Petitioner's Opening Brief, pages 8-20.) However, the hearing examiner made the following findings with regard to deception:

1. The brown window envelopes caused deception in that they appear to be from an official source. (C.T. 106)
2. The "skip-tracer" forms are an independent instrumentality of deception because the disclaimer thereon is too inconspicuous. (C.T. 106) (Footnote 1: The Commission's brief unjustifiably mis-states Petitioner's arguments regarding the skip-tracer forms in its Footnote 3 on page 5 of its brief.)
3. The payment demand forms in and of themselves are not deceptive since they plainly reveal a private indebtedness and a simple demand for payment. (C.T. 123)
4. The use by Petitioner on its Payment Demand forms of the statement of the creditor's rights was not actionable misrepresentation and the Examiner dismissed the charge. (C. T. 103)
5. The issue of third party authority had not been sufficiently raised by the complaint and the hearing examiner held that the

complaint did not encompass such a charge.

(C.T. 85-87, 115, 121)

Petitioner, by pointing out the hearing examiner's findings at this point, does not concede that any deception exists in his practices, but such findings are set forth at this point to illustrate that evidence before the Commission -- which was the same evidence that was before the hearing examiner -- does not support the broad, all-inclusive and destructive order of the Commission.

The Commission, under the facts presented to it -- which were the same facts that were before the hearing examiner -- should have, at the very most, sustained the finding of the examiner. "And while the findings of an examiner are not 'as unassailable as a master's' (universal Camera Corp. vs. National Labor Relations Board, 340 U.S. 474, 492, 71 S.Ct. 456, 467), where it appears from the record that they are supported by a preponderance of the evidence, the action of the Commission in rejecting them is arbitrary. Folds vs. Federal Trade Commission, 7 Cir. 187 F.2d 658, 661." Minneapolis-Honeywell Regulator Company vs. Federal Trade Commission, 191 F.2d 786 (7 Cir. 1951).

II

AN ORDER BY THE COMMISSION WHICH

FAR EXCEEDS THAT WHICH IS "REASONABLY NECESSARY" TO PROTECT THE PUBLIC IS UNREASONABLE, ARBITRARY, AND IS AN ABUSE OF THE COMMISSION'S DISCRETION.

It has long been held that the orders of the Federal Trade Commission should go no further than is reasonably necessary to correct the evil and preserve the rights of competitors and the public. Federal Trade Commission vs. Royal Milling Company, 288 U.S. 212 (1932). And, in addition, it has long been held that Commission findings or rulings which are arbitrary or capricious cannot be sustained by an appellate court. Benrus Watch Company vs. Federal Trade Commission, 352 F.2d 313 (8 Cir. 1965); Corn Products Refining Company vs. Federal Trade Commission, 324 U.S. 726 (1963); Continental Wax Corporation vs. Federal Trade Commission, 330 F.2d 475 (2 Cir. 1964); National Trade Publications, Inc. vs. Federal Trade Commission, 300 F.2d 790 (8 Cir. 1962); United States Retail Credit Association vs. Federal Trade Commission, 300 F.2d 212 (4 Cir. 1962); Chain Institute, Inc. vs. Federal Trade Commission, 246 F.2d 231 (8 Cir. 1957).

In the present case, it was found by the hearing examiner that the order that was "reasonably necessary" to protect the public was such that Petitioner was ordered to: (1) Use only white envelopes in connection with his skip-tracer and/or collection forms; (2) Place

a disclaimer on the skip-tracer forms in a prominent place, in lettering at least as large as the largest lettering (except for caption) used on the forms; (3) Not represent, directly or by implication, that any of Petitioner's Payment Demand forms have been approved by the Federal Trade Commission; and (4) Not misrepresent Federal Trade Commission or court approval of any of petitioner's envelopes, forms or other material. (C.T. 137-140).

Again, it is not Petitioner's intention here to concede that any deception exists in his practices, nor that the hearing examiner's order was valid when it is considered that no deception actually does exist. Petitioner simply intends to point out that the hearing examiner, after long and careful consideration of the facts, came to the conclusion that all that was "reasonably necessary" to protect the public was those items as set forth in his order. It is Petitioner's contention that this case is a perfect example of what the Supreme Court recognized when it stated that "*** Evidence supporting a conclusion may be less substantial when an impartial, experienced examiner who has observed the witnesses and lived with the case has drawn conclusions different from the Board's (Commission's) ***." (Emphasis and parentheses added) Universal Camera Corporation vs. N.L.R.B., 340 U.S. 474.

"The statute gives this court power not only to affirm or reverse but also to modify the orders of the Commission. 15 U.S.C.A. Sec. 45 (c) and (d). This power to modify extends to the remedy. Federal Trade Comm. vs. Royal Milling Co., et al., 288 U.S. 212, 53 S.Ct. 335, 77 L.Ed. 706; Carter Products, Inc., et al. vs. Fed. Trade Comm., 1951, 186 F.2d 821." Folds vs. Federal Trade Commission, 187 F.2d 658, 661 (7 Cir. 1951.) Thus, if this court were to agree with the hearing examiner that some limited deception existed in Petitioner's practices (in spite of Petitioner's many points to the contrary), this court should simply modify the Commission's order to comply with the hearing examiner's order.

III

PUBLIC POLICY AND INTERESTS REQUIRE THAT PETITIONER BE ALLOWED TO CONTINUE HIS LEGITIMATE BUSINESS OF SELLING FORMS TO CREDITORS.

As was pointed out in Petitioner's Opening Brief at pages 28-31, the hearing examiner in his initial decision recognized the public interest in allowing Petitioner to continue his business.

It is a fact of life that consumer credit has been increasing in this country at a rate of 0.5 billion dollars annually. 51 Fed. Reserve Bull. 1152 (1965).

Accompanying this enormous increase in credit that is extended is an increase in the number of instances where creditors are forced to bring some type of pressure upon the debtors in the collection of the accounts. The public has an interest in seeing that the methods of collection are both effective and inexpensive. First, it is important to note that it is economically sound to provide an effective and inexpensive means of collection of consumer debts. As the hearing examiner below recognized, "Moreover, it is obvious under our system that if debtors do not pay their debts the loss to creditors is shifted to other consumers or purchasers; or if the loss becomes so large as to be insurmountable, the result is bankruptcy for the creditors or at least going out of business." (C.T. 29-30) It is a simple principle of business that bad debts are an expense that must be borne either by the creditor or the public. If this expense becomes unreasonable, it is obvious that some of the burden will be shifted to the public.

Attempts are constantly being made by business and by other groups interested in the public welfare to reduce the cost of collecting these amounts from irresponsible debotrs. 14 U.C.L.A. Law Rev. 879. Forms which Petitioner makes use of in his business have been found to be very inexpensive. The hearing examiner stated it very well in his initial decision:

"Skip-tracer and collection forms are necessary, it seems to the examiner, because of the small dollar amount of each indebtedness in many lines of trade, particularly as brought about by mass selling, which is so characteristic of our present free enterprise system. Obviously, lawyers cannot afford to take on accounts of this nature, or, if they do -- often as auxiliaries to collection agencies -- the amount of their fees and court costs tend to discourage further retention of the attorneys or other collection agencies which may have retained them. Moreover, the fees of collection agencies, even without forwarding to attorneys are not unsubstantial. Small businesses, which many people regard as of particular concern to the Commission, as well as middle-sized businesses, thus very often have to depend on collection efforts through collection forms, rather than utilizing collection agencies, with or without attorneys, or utilizing attorneys directly." (C.T. 128-129)

An additional expense which would be thrust upon the public if Petitioner is not allowed to continue his legitimate use of his collection forms, is the cost to the public of the many bankruptcies that result from other forms of collection efforts. Garnishment and other attachment proceedings are a prime cause of forcing debtors into bankruptcy. "Why So Many Bankruptcies in Oregon?", 40 Journal of National Conference of Referees in Bankruptcy, 78 (July 1966). Lawsuits against debtors also aid in the encouragement of bankruptcies. 14 U.C.L.A. Law Rev. 879. The method of using Petitioner's collection forms does not bring this type of pressure upon the debtors. Their wages are not touched and their property is not attached.

Second, it is of interest to the public to see that creditors (businessmen) are allowed to collect debts legitimately owed. It is certainly important to see that businesses survive and extend credit, and one element necessary to insure their survival is to permit creditors to pursue their rights of collection even though the results might be emotionally disturbing to others. This privilege arises from the relationship between the debtor and the creditors. "The debtor has voluntarily chosen to join the modern trend toward credit living, and, in so doing, has impliedly assented to pressure from those who have a legitimate interest in the timely payment of

his debts. Gouldman-Taber Pontiac, Inc. vs. Zerbst, 213 Ga. 682, 684, 100 S.E.2d 881, 883 (1957)." 17 Hast. L. J. 369, 371.

In order to protect these public interests in the collection of debts, the order of the Federal Trade Commission, as pointed out in Petitioner's opening brief (C.T. 21-22, 28-31) effectively destroys this method of collection and should be reversed.

CONCLUSION

It is respectfully submitted for the above reasons and for the reasons set forth in Petitioner's Opening Brief that the order of the Federal Trade Commission is erroneous and void. This court should vacate that order and dismiss the complaint.

Respectfully submitted,

MURRAY M. CHOTINER

Attorney for Petitioner